United States Court of Appeals

for the Second Circuit

APPELLEE'S BRIEF

75-7652

In the

UNITED STATES COURT OF APPEALS

FOR THE SECOND CIRCUIT

DONALD M. KINSELLA,

Plaintiff-Appellant,

-against-

BOARD OF EDUCATION OF THE CENTRAL SCHOOL DISTRICT NO. 7 OF THE TOWNS OF AMHERST AND TONAWANDA, ERIE COUNTY and EWALD B. NYQUIST, COMMISSIONER OF EDUCATION OF THE STATE OF NEW YORK,

Defendants-Appellees.

ON APPEAL FROM THE UNITED STATES DISTRICT COURT FOR THE WESTERN DISTRICT OF NEW YORK

BRIEF FOR APPELLEE COMMISSIONER OF EDUCATION

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Defendants-Appellees.

ON APPEAL FROM THE UNITED STATES
DISTRICT COURT FOR THE WESTERN
DISTRICT OF NEW YORK

BRIEF FOR APPELLEE COMMISSIONER OF EDUCATION

Preliminary Statement

This is an appeal from an order of the United States District Court for the Western District of New York (Hon. John T. Curtin), dated October 21, 1975, denying plaintiff-

appellant's (hereinafter "plaintiff's") motions for further relief. A. 372.*

The District Court's denial of the motions left in full force and effect an order of defendant-appellee Board of Education. . .of District No. 7 (hereinafter "defendant School Board"), dated July 24, 1974, A. 179-180. That order dismissed plaintiff from his position as a tenured physical education teacher after full evidentiary hearing (A. 175-178) on stated charges (A. 283-284) because of his excessive use of physical force and corporal punishment. A. 179-180.

The motions were alleged to be incidental to an action brought by the same plaintiff against the same defendants and determined in the Western District on February 19, 1974. A. 161-167, 360.

Opinions Below

The opinion of District Judge Curtin in issue on this appeal is reported at 402 F. Supp. 1155. It is reproduced in the Appendix at A. 357-372.

* References preceded by the letter "A" refer to the Appendix filed on this appeal.

The opinion of the three-judge court in the main action is reported at 378 F. Supp. 54. It is reproduced in the Appendix at A. 161-167.

Questions Presented

1. Whether plaintiff has standing to raise a state law claim against the power of the Commissioner of Education to amend regulations governing tenure hearings when the amendments conform with a federal injunction plaintiff obtained and he can claim no injury flowing from the exercise of the Commissioner's power?

2. Whether the District Court had jurisdiction to adjudicate a state claim first raised on a motion for further relief under 28 U.S.C. § 2202 when the federal predicate for the main action no longer existed and the state claim was not part of the same constitutional case?

3. Assuming there was an appropriate federal predicate for the pendent state claim, did the District Court clearly abuse its discretion in refusing to adjudicate that claim in light of its remoteness from the main action and the fact that it had already been determined by the state courts?

4. Whether plaintiff's dismissal following an evidentiary hearing on stated charges, a hearing panel report and a written determination of defendant School Board based on the record of the hearing comports with requirements of the Due Process Clause of the Fourteenth Amendment? This issue is briefed by defendant School Board.

Federal Statute Involved

28 U.S.C. § 2202 states:

> "Further relief
>
> Further necessary or proper relief based on a declaratory judgment or decree may be granted, after reasonable notice and hearing against any adverse part whose rights have been determined by such judgment."

State Regulations Involved

8 New York Code, Rules and Regulations ("NYCRR") § 82.10(h) as amended, effective February 28, 1974, states:*

> "(h) The findings of the panel on each charge, and the recommendations of the panel as to disciplinary action, if any, against the employee shall be

* The February 28, 1974 amendment is underlined. This amendment was adopted to conform with the "so ordered" opinion of the three-judge court in the main action. A. 161-167.

submitted to the hearing officer, together with the panel members' copies of the transcript, no later than the adjourned date of the hearing. Upon receipt of such findings and recommendations, the hearing officer shall declare the hearing concluded, and shall forward the findings and recommendations, together with the three copies of the transcript, to the commissioner. The commissioner shall forward a report of the hearing, including the findings and recommendations of the hearing panel and their recommendations as to the penalty if one is warranted, together with a copy of the transcript of the proceedings before the hearing panel to the employee and to the clerk of employing board."

8NYCRR § 82.11, as amended, effective February 24, 1974, states in part:*

"Decision of the board. The decision of the board of education shall be based solely upon the record in the proceedings before the hearing panel, and shall set forth the reasons and the factual basis for the determination."

* The February 24, 1974 amendment is underlined. This amendment was adopted to conform with the "so ordered" opinion of the three-judge court in the main action. A. 161-167.

Statement of the Case

In November of 1974, plaintiff brought two motions for further, or "supplementary," relief allegedly pursuant to 28 U.S.C. § 2202 before the United States District Court for the Western District of New York.

The first motion* sought to declare amendments to 8 NYCRR §§ 82.10(h) and 82.11 null and void (A. 152-160) on the ground that prior to their promulgation, the defendant Commissioner had not submitted the amendments to the Temporary President of the Senate or the Speaker of the Assembly of the New York State Legislature (A. 157) and had not consulted with the Secretary of State or obtained his approval. A. 158.** It was further alleged that the promulgation of the rules and regulations, as amended, was generally beyond the power of the defendant Commissioner. A. 158, 159.

*Designated Motion I by plaintiff on this appeal. Plaintiff's brief, p. 4.

**Plaintiff conceded that the regulations, as amended, had in fact been filed with the Secretary of State. Id.

The second motion* sought nullification of the defendant School Board's order of dismissal, dated July 24, 1974 (A. 179-180), and plaintiff's reinstatement to his position as a tenured physical education teacher. A. 185-196. The motion was supported by an alleged denials of plaintiff's right to due process of law during his pre-dismissal administrative proceedings as follows: the "panel report" (of three impartial hearing officers empowered to make recommendations) did not contain a summary of evidence and credibility resolutions, or make specific findings on each charge and specification (A. 193);** the order of dismissal did not identify specific portions of the transcript or exhibits

*Designated Motion II by plaintiff on this appeal. Plaintiff's brief, p. 4.

**It is plain from the report (A. 175-178) that the panel believed plaintiff guilty on all charges and specifications. The defendant School Board, charged with making the final determination on the basis of the evidentiary record, found plaintiff had in fact committed the acts alleged in each of the three specifications and that he was therefore guilty of the misconduct charged. This result perforce includes "credibility resolutions." Compare order of dismissal at A. 179-180 with charges and specifications at A. 283-284.

although it states that the transcript has been read and makes findings of fact (A. 193, 194); the order of dismissal does not state in terms that no ex parte evidence had been relied upon (A. 193-194); and the order of dismissal was an inadequate record for purposes of state court review (A. 194) notwithstanding such review would be based on all of the evidence including the 700 page transcript of the evidentiary hearing plus exhibits. See New York Civil Practice Law and Rules Article 78.

Plaintiff contended that the district court had subject jurisdiction over the two motions by reason of its prior adjudication of his claims against the same defendants in Kinsella v. Board of Education ... District No. 7 ... and Ewald B. Nyquist, Commissioner of Education ... , 378 F. Supp. 54 (W.D.N.Y., February 19, 1974, amended February 20, 1974) (three-judge court). A. 161-167. Plaintiff's brief, p. 7.

In the prior adjudication, plaintiff challenged the constitutionality of Education Law § 3020-a governing tenure hearings on the ground, inter alia, that although the statute "provides of a hearing that conforms to due process standards, the right to the hearing is illusory because nothing that

occurs before the hearing panel need have any impact on the school board's final determination." A. 166. The three-judge court agreed to the extent that § 3020-a did not require that the school board's final determination be "based upon evidence elicited before the hearing panel" or "set forth the reasons and factual basis" in supporting the decision. A. 167. The statute was enjoined pending administrative or legislative action to remedy the two defects. Id.

The defendant Commissioner took remedial administrative action within approximately 8 days of the three-judge court opinion by promulgating amendments to existing regulations, 8 NYCRR §§ 82.10(h) and 82.11, requiring the transmittal of the transcript of the proceedings before the hearing panel as well as its findings and recommendations to the employing school board and further requiring such school board to base its decision solely upon the record of the panel proceedings and to set forth the reasons and factual basis for its determination in its decision. See text of 8 NYCRR §§ 82.10(h) and 82.11, as amended, pp. 4-5 ante.

Plaintiff's tenure hearing was thereafter resumed, resulting in the order of dismissal (A. 179-180) sought to

be annulled on the motions on appeal herein.

In his opinion below, Judge Curtin refused to adjudicate the state law challenge to the 8 NYCRR §§ 82.10(h) and 82.11 raised on Motion I (A. 360-361) and found the constitutional claims raised on Motion II insubstantial (A. 362-369). On Motion I, the district judge relied principally on United Mine Workers v. Gibbs, 383 U.S. 715 (1966), and held that the state law issue was "not truly pendent" to the original due process claim because, when viewed together, the two claims did not present one constitutional case. A. 361, 362. In the alternative, Judge Curtin held that adjudication of a pendent claim was discretionary with the court and declined to exercise his discretion. A. 361. Recent state court adjudications of the alleged pendent issue were noted. A. 361, 370 n.2.

POINT I

PLAINTIFF LACKS STANDING TO CONTEST THE AUTHORITY OF THE COMMISSIONER OF EDUCATION IN AMENDING 8 NYCRR §§ 82.10(h) AND 82.11. PLAINTIFF DID NOT SUFFER ANY HARM AS A RESULT OF THE COMMISSIONER'S EXERCISE OF POWER BUT RATHER OBTAINED A CODIFICATION OF THE EXACT DUE PROCESS PROTECTIONS HE HAD PREVIOUSLY SOUGHT FROM THE DISTRICT COURT AND THAT COURT HAD MANDATED DEFENDANTS TO PROVIDE.

The individual asserting a claim must support it with a showing that he "'has sustained or is immediately in danger of sustaining some directy injury' as a result of the challenged statute or official conduct." O'Shea v. Littleton, 414 U.S. 488, 494 (1974) quoting Massachusetts v. Mellon, 262 U.S. 447, 488 (1923). Abstract injury is not sufficient since the claim must be determined within a judicial system that requires an adversary relationship between opposing parties. See Linda R.S. v. Richard D., 410 U.S. 614, 617 (1973); Flast v. Cohen, 392 U.S. 83, 94-101 (1968); Hall v. Beals, 396 U.S. 45, 48-49 (1969); Baker v. Carr, 369 U.S. 186, 204 (1962); Muskrat v. United States, 219 U.S. 346, 361 (1910). State law to the same effect, Donohue v. Cornelius, 17 N Y 2d 390 (1966).

Plaintiff herein alleges no injury flowing from the alleged ultra vires exercise of the Commissioner's rule making authority, and in fact he can show no such injury. Rather, he benefitted from the amendments to 8 NYCRR §§ 82.10(h) and 82.11 since they provided exactly those aspects of due process he sought from the three-judge district court in his main action and that court predicated its injunction upon, namely, an obligation on the part of the defendant School Board to base its final determination exclusively on the record of the proceedings before the hearing panel and to set forth the reasons and factual basis for that determination. A. 167. Indeed, plaintiff makes (and could make) no challenge to the consistency of these requirements with the Due Process Clause. Given that the Commissioner's action provided plaintiff with the relief he sought, plaintiff's claim against the Commissioner's exercise of authority reduces itself to an allegation of injury from an exercise of authority which afforded him due process of law. As such, plaintiff can show no injury in fact, and he therefore, lacks standing to maintain his claim. See Morgan v. Montanye, 510 F. 2d 1367 (2d Cir. 1975), holding that a prisoner had no standing to maintain civil rights action although his attorney mail had been inspected by prison authorities and a portion of a legal brief lost since prisoner showed no actual injury as a result thereof.

POINT II

THE CHALLENGE TO THE COMMISSIONER'S RULE MAKING AUTHORITY IS NOT A TRUE PENDENT STATE CLAIM. NO FEDERAL PREDICATE EXISTED FOR THE CLAIM WHEN IT WAS FIRST RAISED. ASSUMING ARGUENDO, THAT A FEDERAL PREDICATE CONTINUED TO EXIST, THE STATE LAW CLAIM AND THE FEDERAL CLAIM WERE NOT PART OF THE SAME CONSTITUTIONAL CASE.

The district court never acquired the requisite subject matter jurisdiction to adjudicate the state law issue since by the time the claim was first raised on the motion for further relief, the subject matter jurisdiction acquired by reason of the federal claims in the main action had ceased. Alternatively, the state law issue did not derive from a "common nucleus of operative fact" with the original federal claims. United Mine Workers v. Gibbs, supra at 725.

United Mine Workers v. Gibbs, supra, sets forth the test of subject matter jurisdiction over pendent claims as follows:

> "Pendent jurisdiction, in the sense of judicial power, exists whenever there is a claim 'arising under [the] Constitution, the Laws of the United States, Treaties made, or which shall be made under this authority. . .' U.S. Const. Art. III, § 2, and the relationship

> between that claim and the state claim permits the conclusion that the entire action before the Court comprises but one constitutional 'case'. . .
>
> The state and federal claims must derive from a common nucleus of operative fact. But if, considered without regard to their federal or state character, a plaintiff's claims are such that he would ordinarily be expected to try them all in one judicial proceeding, then assuming substantiality of the federal issues, there is power in the federal courts to hear the whole."
> [Footnotes omitted]

Accord, Almenares v. Wyman, 453 F. 2d 1075, 1083 (2d Cir. 1971) (citing Gibbs test). See Hurn v. Oursler, 289 U.S. 238, 245 (1933) stating that pendent jurisdiction "does not go so far as to permit a federal court to assume jurisdiction of a separate and distinct non-federal cause of action because it is joined in the same complaint with a federal course of action." See also Jarrett v. Resor, 426 F. 2d 213, 216 (9th Cir. 1970), stating established principle that the Declaratory Judgment Act under which motions were brought "does not create subject matter jurisdiction where none exists."

Plaintiff relies on his claim before the three-judge court as the federal predicate, or jurisdiction vesting claim, for the state law issue raised on his motion for further

relief under 22 U.S.C. § 2202. Plaintiff's brief, pp. 9-10. However, the state law issue was raised after the three-judge court had adjudicated those claims and after the plaintiff had been afforded an evidentiary hearing with a full panoply of due process protections. Thus, the subject matter jurisdiction which supported plaintiff's original claims of denial of due process in the hearing procedures could not have continued to exist once plaintiff was afforded a hearing with all the process that was due. Compare, Rosado v. Wyman, 397 U.S. 397 (1970), subject matter jurisdiction over pendent claim raised while jurisdiction vesting claim was viable notwithstanding latter claim subsequently become moot.*

Even if a surviving federal claim is found, plaintiff's claim does not share a "common nucleus of operative fact" with the federal claim, and thus, there is no jurisdiction over the state law claim. Plaintiff's due process claims involve the manner in which his own disciplinary proceeding was conducted; his state law claim is directed exclusively to the manner in which the Commissioner promulgates regulations, matters which the plaintiff concedes have no effect on the quality of his hearing or on his due process rights.

* Motion II cannot be viewed as providing plaintiff with a federal predicate for Motion I since the due process claims raised on Motion II are insubstantial and thus preclude the vesting of subject matter jurisdiction. A. 362-369.

POINT III

ASSUMING ARGUENDO, THAT THE STATE LAW CHALLENGE TO 8 NYCRR §§ 82.10(h) AND 82.11 PRESENTED A TRUE PENDENT CLAIM, THE DISTRICT COURT PROPERLY REFUSED TO ADJUDICATE IT IN LIGHT OF STATE COURT DECISIONS ON THE IDENTICAL ISSUE.

Even if the District Court obtained subject matter jurisdiction over the state law issue, it properly declined to adjudicate the claim in the exercise of its sound discretion. As stated in Gibbs, supra at 726-727:

> "[The] power [to hear and determine the pendent claim] need not be exercised in every case in which it is found to exist. It has consistently been recognized that pendent jurisdiction is a doctrine of discretion, not of plaintiff's right. Its justification lies in considerations of judicial economy, convenience and fairness to litigants; if these are not present a federal court should hesitate to exercise jurisdiction over state claims, even though bound to apply state law to them, Erie R. Co. v. Tompkins, 304 U.S. 64. Needless decisions of state law should be avoided both as a matter of comity and to promote justice between the parties, by procuring for them a surer-footed reading of applicable law* * *[I]f it appears that the state issues substantially predominate, whether in terms of proof, of the scope of the issues raised, or of the comprehensiveness of the remedy sought, the state claims may be dismissed without prejudice and left for resolution to state tribunals. There may on the

> other hand, be situations in which the state claim is so closely tied to questions of federal policy that the argument for exercise of pendent jurisdiction is particularly strong * * *[R]ecognition of a federal court's wide latitude to decide ancillary questions of state law does not imply that it must tolerate a litigant's effort to impose upon it what is in effect only a state law case." [Footnotes omitted]

At the time of Judge Curtin's decision, Hodgkins v. Central School Dist. No. 1, 48 A D 2d 302 (3rd Dept. 1975) had been recently decided by the Appellate Division. The identical state law issue with respect to 8 NYCRR §§ 82.10(h) and 82.11 was presented on that case and decided in favor of the defendant Commissioner.

Accordingly, principles of comity dictated avoidance of a second adjudication of the same issue by a lower federal court. Certainly, no "surer-footed" ruling could have been obtained in the district court, and there was no "close tie" to federal policy. Conversely, no showing was made by plaintiff below and none is made herein which supports the exercise of the district court's discretion in his favor.

CONCLUSION

FOR THE FOREGOING REASONS AND THOSE SET FORTH IN THE BRIEF OF DEFENDANT SCHOOL BOARD, THE ORDER BELOW SHOULD BE AFFIRMED.

Dated: New York, New York
April 21, 1976

Respectfully submitted,

LOUIS J. LEFKOWITZ
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State of New York
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STATE OF NEW YORK)
: SS.:
COUNTY OF NEW YORK)

JUDITH A. GORDON, being duly sworn, deposes and says that on the 21st day of April, 1976, she served the annexed upon

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attorneys for plaintiff-appellant in the within appeal by personally delivering and leaving copies thereof with the person in charge of the office of said attorneys at the above stated address, said address having been designated by them for that purpose.

Judith A. Gordon

Sworn to before me this
21st day of April, 1976

Assistant Attorney General
of the State of New York

STATE OF NEW YORK)
: SS.:
COUNTY OF NEW YORK)

JEANETTE MARCELINA , being duly sworn, deposes and says that she is employed in the office of the Attorney General of the State of New York, attorney for Appellee Commissioner of Education herein. On the 21st day of April , 1976 , she served the annexed upon the following named person :

OHLIN, DAMON, MOREY, SAWYER & MOOT
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Attorneys in the within entitled appeal by depositing a true and correct copy thereof, properly enclosed in a post-paid wrapper, in a post-office box regularly maintained by the Government of the United States at Two World Trade Center, New York, New York 10047, directed to said Attorneys at the addresses within the State designated by them for that purpose.

Jeanette Marcelina

Sworn to before me this
21st day of April , 1976

Assistant Attorney General
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